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No.

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Supreme Court of the United States

OCTOBER TERM, 1971

71-865

POST-NEWSWEEK STATIONS, CAPITAL AREA, INC.,
Petitioner,

v.

BUSINESS EXECUTIVES' MOVE FOR VIETNAM PEACE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on August 3, 1971.[1]

[1]The Court of Appeals considered in a single opinion both this case (No. 24,492 below) and a companion case (No. 24,537 below). Petitioner was a party in No. 24,492 and this petition is directed to that case.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet officially reported, appears as Appendix A of the petition of the Federal Communications Commission and the United States.[2] The opinion of the Commission is reported at 25 F.C.C. 2d 242 and appears as Appendix C of the FCC's petition.

JURISDICTION

The judgment of the Court of Appeals was entered on August 3, 1971 and appears as Appendix D of the FCC's petition. A timely petition for rehearing was denied by the Court of Appeals on October 4, 1971 by an order which appears as Appendix E of the FCC's petition. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether the First Amendment requires a radio station, which has provided full and fair coverage of the diverse viewpoints on a controversial public issue, to sell on demand broadcast advertising time to a private individual or a group for brief "spot" announcements asserting that individual or group's views on the same issue.

STATUTE INVOLVED

Sections 3(h) and 315(a) of the Communications Act of 1934, 47 U.S.C. §§153(h), 315(a), appear at page 3 of the FCC's petition.

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[2]The FCC and the United States have petitioned for certiorari to review the same decision involved in this petition. Their petition will be cited as "FCC Pet." References to the joint appendix in the Court of Appeals, a copy of which is being lodged with the Clerk of this Court, will be cited as "J.A."

STATEMENT

This case concerns a newly asserted First Amendment "right" to compel a radio station, which is presently providing full and fair coverage of a controversial public issue, to sell "spot" advertising time to private parties to assert their views on the same issue. This constitutional claim, accepted by a divided Court of Appeals over the opposition of the agency charged with administering the Communications Act, has far-reaching consequences for the balance of broadcast programming in this country and for the legal regime within which the broadcasting industry operates.

In June 1969 and twice thereafter, the respondent organization, Business Executives' Move for Vietnam Peace ("BEM"), sought to purchase advertising time on radio station WTOP, operated in the District of Columbia area by the petitioner Post-Newsweek Stations, Capitol Area, Inc. ("WTOP") (J.A. 84). BEM's purpose was to present a series of sixty-second "spot" announcements, samples of which appear in the record, conveying its opposition to the Vietnam war (J.A. 8).

By express provision of the Communications Act of 1934 ("the Act"), WTOP like all other broadcasters is not a "common carrier," obligated to carry any message or program proffered to it.[3] At the same time, the Commission has administered the Act to require broadcasters such as WTOP to devote reasonable time to presenting a fair spectrum of views on controversial public issues.[4] WTOP has,

[3]Section 3(h) of the Act, 47 U.S.C. §153(h), expressly provides *inter alia* that "a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier."

[4]The requirement that a broadcaster, in its overall treatment of a controversial public issue, give a fair presentation of the range of diverse views is embodied in the FCC's "fairness doctrine." See *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance*, 40 F.C.C. 598 (1964) (*"Fairness Primer"*). The doctrine is premised on the Act's "public interest" standard governing broadcasting licensing (*e.g.*, Section 309, 47 U.S.C. §309),

as the record shows (J.A. 86-87), provided such full and fair coverage of the range of diverse views about the Vietnam war including the views asserted in BEM's proposed "spot" announcements. See pp. 5-6, *infra.*

WTOP declined to sell BEM the "spot" announcement time requested because of its longstanding general policy not to sell "spot" announcement time for editorial advertisements on controversial public issues (J.A. 7). As WTOP explained to the Commission, it currently broadcasts diverse views of interested spokesmen on different sides of public issues through a wide range of commentaries, interviews, news reports and other presentations (J.A. 18-19). WTOP's policy is neither required nor forbidden by the Commission, and BEM did in fact purchase "spot" advertising time for its Vietnam war messages on several other stations in the Washington, D. C., area (J.A. 28-29).

In January 1970, BEM filed a complaint with the Commission requesting that WTOP be required to furnish it free time for its "spot" announcements or, in the alternative, to sell it that time. BEM's central claim was that WTOP's coverage of the Vietnam war did not adequately portray the range of views among opponents of Government policy on the war in accordance with the Commission's fairness doctrine (J.A. 3-4). Among other contentions, BEM also complained that WTOP's refusal violated the public's "right to hear" and that WTOP was obligated by the First Amendment to carry BEM's announcements (J.A. 5-6).

BEM did not assert before the Commission any facts that supported its charge under the fairness doctrine that WTOP had failed to present full and fair coverage of the Vietnam war. Despite the absence of *any* such evidence, WTOP affirmatively showed that it had provided full and

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and has received Congressional approval in Section 315(a), 47 U.S.C. §315(a), which speaks of "the obligation imposed upon . . . [broadcasters] under this [Act] . . . to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."

fair coverage of the war, including news reports of statements by officials of the Government and by its critics, coverage of press conferences and meetings of various groups advancing different positions about the war, and broadcasts carrying the views of leading Congressional spokesmen and WTOP's own regular commentators reflecting widely differing views about the war.[5]

BEM also made no factual showing that its views would not reach the listening public unless WTOP were required to furnish it the broadcast time in question. WTOP's executive editor responsible for news and informational programming stated that the very views embodied in the BEM "spot" announcements were of his own knowledge "expressed on a number of occasions in various types of broadcasts over WTOP . . . " (J.A. 46). The record also indicated that other Washington, D. C., area stations did carry BEM's "spot" announcements (J.A. 28-29).

In its decision released in April 1970, the Commission found no basis for concluding that the fairness doctrine had been violated.[6] It noted that the "multiplicity of spokesmen available" to express views on the war made it obvious that a broadcaster must exercise its judgment in selecting spokesmen "to insure an orderly and effective presentation of the many conflicting views" (J.A. 86-87). In light of WTOP's uncontroverted evidence of the diversity of its

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[5]Among other examples, WTOP pointed to its coverage of press conferences, meetings, rallies and demonstrations including those of such anti-war groups as the Vietnam Moratorium Committee and the New Mobilization Committee to End the War in Vietnam and such pro-Administration groups as Americans for Peace with Freedom and Young Americans for Freedom (J.A. 16). WTOP also cited, among other Congressional spokesmen who had appeared on the station, Senators McGovern, Gore, Goodell, Mansfield, Percy, Goldwater, Tower and Scott and Representatives McCormick and Ford. *Id.*

[6]The vote in the Commission was six to one, Commissioner Johnson filing a lengthy dissent. The dissent, however, was addressed solely to constitutional issues and did not question WTOP's compliance with the fairness doctrine (J.A. 91).

coverage of the war, the Commission concluded in substance that WTOP had exercised a good faith and reasonable judgment in its coverage and complied with the requirements of the fairness doctrine (J.A. 87).

The Commission, with Commissioner Johnson dissenting, rejected BEM's claim that it had an absolute constitutional right to require WTOP to sell it time for its "spot" announcements despite WTOP's full and fair coverage of conflicting views on the war, including BEM's own views. The FCC decision pointed out that this Court's opinion in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), had described the broadcaster's undertaking as one "to present *representative* community views on controversial issues . . . " (J.A. 89).[7] The Commission also observed that, within the limits of the fairness doctrine, the Act had imposed upon the broadcaster the obligation to exercise his judgment in selecting program matter, format, and the individuals who appeared on the station, so that the relief sought by BEM was flatly at odds with the Congressional plan for broadcasting (J.A. 90).

BEM sought review of the Commission's decision in the Court of Appeals for the District of Columbia Circuit which, by a two-to-one vote, reversed the decision of the agency.[8] The lower court held that, regardless of Congressional or agency policy, the First Amendment made it unconstitutional for WTOP to decline to sell "spot" advertising time for editorial advertising such as BEM sought to present, and the opinion deemed WTOP's policy to constitute "state action" for this purpose although it was neither required nor

[7] In *Red Lion*, this Court upheld the FCC's "personal attack" and "candidate endorsement" regulations, the two applications of the fairness doctrine that have been codified in regulation form. More broadly, the Court rejected both statutory and constitutional claims directed against the fairness doctrine on a variety of grounds.

[8] Jurisdiction of the Court of Appeals rested upon Section 402(a) of the Act, 47 U.S.C. §402(a), and upon 28 U.S.C. §2342. WTOP was permitted to intervene in the review proceeding in support of the Commission's decision. 28 U.S.C. §2348.

instigated by the Commission (FCC Pet. 10a-11a, 42a-43a). The court did not question the record evidence showing that WTOP had presented a full and fair range of views about the war including the views of BEM; it declined to say whether its holding would apply to a station which broadcast no advertising whatever (FCC Pet. 3a, 36a).

In dissent, Judge McGowan indicated that the Court's decision in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), had made it clear that there is no absolute First Amendment right of particular individuals or groups to broadcast, and he observed that Congress' reliance on private licensees, constrained to fair presentation of controversial views under the fairness doctrine, has generally been effective in implementing "the public's right to know" (FCC Pet. 45a-46a). He questioned the wisdom of adopting a regime "in which money alone determines what issues are to be aired" and concluded that, in any event, the First Amendment did not require that result (FCC Pet. 46a-47a).

REASONS FOR GRANTING THE WRIT

I. THE LOWER COURT HAS DETERMINED A MAJOR CONSTITUTIONAL QUESTION WHICH SHOULD BE RESOLVED BY THIS COURT.

The opinion below has in substance created a new First Amendment "right" of private individuals and groups which, if allowed to stand, is certain to have a substantial impact upon broadcasting in this country and the regulatory regime established by Congress. The opinion below, in declaring that the Constitution compels a broadcaster to sell time for editorial "spot" advertising on issues already fully and fairly covered by the station, has no precedent in the decisions of this or any other court.[9]

[9]The only decision located concerning a claimed First Amendment "right" to broadcast time squarely rejected such a claim, observing that freedom of speech "does not mean . . . that . . . [an individual] may

The importance of the constitutional issues presented and their unprecedented resolution by the lower court themselves justify review here under the standards for certiorari followed by this Court. The significance of the decision is especially great because, unlike decisions such as *Red Lion*,[10] it does not hold that a plan deemed wise by Congress or the agency is *permitted* by the First Amendment; instead, it holds that the Constitution *compels* a particular approach, whatever Congress or the agency may deem to be sound policy. The dissenting opinion below aptly described the decision in this respect as establishing "a constitutional straitjacket" (FCC Pet. 47a).

The decision below is additionally deserving of review because it is based upon a misconstruction of the decisions of this Court dealing with the relationship of broadcasting and the First Amendment. From its opinion in *National Broadcasting Co. v. United States*, 319 U.S. 190, 226 (1943), to the present, the Court has remarked that "unlike other modes of expression, radio inherently is not available to all. . . . Because it cannot be used by all, some who wish

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seize a particular radio station for his forum." *McIntire v. Wm. Penn Broadcasting Co.*, 151 F. 2d 597, 600 (3rd Cir. 1945), *cert. denied*, 327 U.S. 779 (1946). Lower court decisions have on occasion enforced First Amendment claims in relation to other media, for example by requiring a municipal transit system to accept protest advertising. *E.g., Zucker v. Panitz*, 299 F.Supp. 102 (S.D.N.Y. 1969). Such cases do not, however, involve media with the special characteristics of broadcasting including the regulatory regime requiring broadcasters to give full and fair coverage to diverse views on issues of public importance. It should also be noted that predominantly such cases involve city or state premises or enterprises rather than, as here, privately operated facilities.

[10]That decision was accurately described by the lower court as "perhaps the most important recent development" among cases here relevant (FCC Pet. 11a) but, as demonstrated below, its own opinion in this case cannot be squared with *Red Lion*. Cf. Sup. Ct. R. 19(1)(b).

to use it must be denied." It follows, as this Court emphasized in *Red Lion*, that "it is idle to posit an unabridgeable First Amendment right to broadcast" inhering in private parties. 395 U.S. at 388.

As *Red Lion* makes plain beyond peradventure, private interests are subordinate to the paramount public interest in sound utilization of the resource including full and fair presentation of "representative community views" on public issues. 395 U.S. at 394. Other citations and statements in that opinion confirm that, at least in the confines of broadcasting, emphasis must be upon public "access to . . . ideas" rather than access of particular individuals to that form of self-expression. 395 U.S. at 390. In the words of a distinguished commentator on the First Amendment, "What is essential is not that everyone shall speak, but that everything worth saying shall be said."[11]

The lower court's decision stands *Red Lion* on its head. It ignores the unimpeached evidence that WTOP has presented "representative" views on the war including the very views BEM wished to broadcast, and sanctions BEM's claim to arrogate scarce broadcast time to repeat those same views without regard to the full and fair coverage of the issues already available to the public. The decision below thus cannot be squared with the very conception of First Amendment interests in broadcasting which this Court has recently reaffirmed.[12]

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[11] A. Meiklejohn, *Political Freedom* 25-28 (1948). See also II Z. Chafee, *Government and Mass Communications* 624-50 (1947); *Report on Editorializing by Broadcast Licensees*, 13 F.C.C. 1246, 1249 (1949).

[12] Although the lower court's decision is expressly premised upon the First Amendment, it resorts to equal protection principles in relying to some degree upon WTOP's provision of "spot" advertising time for commercial advertising. There is no invidious discrimination, however, in a policy which reasonably distinguishes between commercial and public-issue subjects by presenting the latter, not in paid-for sixty second commercials, but in news broadcasts, public affairs interviews, and a variety of other types of programming normally at the station's expense. The majority opinion suggests that more than a "reasonable"

The result reached by the lower court affirmatively disserves the very First Amendment interests on which the opinion below relies. While this is not the place for a full-scale discussion of the merits of the decision, it is relevant here that the decision threatens to disrupt the balanced presentation of controversial public issues over the airwaves by giving undue weight to those who can pay handsomely for advertising time. This conversion of the public airwaves into a forum for partisan propaganda is the most concrete consequence likely to follow from the decision, although it is not the only threat the decision poses to free-speech interests in broadcasting.

Even the Court of Appeals' majority recognized that a legitimate serious argument against its new regime is the possibility that the cost of broadcast advertising time might lead to domination of editorial advertising by "one part of the political spectrum" (FCC Pet. 40a). This risk can not be dismissed as chimerical at a time when the high price and great influence of political advertising on radio and television has become a recognized fact of life and is even now inspiring proposals designed, not to facilitate the influence of money in the political process, but to blunt its impact. See H. Rep. No. 92-752, 92nd Cong., 1st Sess. 3 (1971). The lower court's bland assertion that this danger can be met by increased Commission regulation is not persuasive in view of the regulatory and financial problems involved (see pp. 17-18, *infra*), and such increased regulation presents First Amendment problems of its own which deserve at least brief comment.

The court below expressly contemplates that in light of its decision the FCC will have to assert increased supervision over programming decisions, through "guidelines" (FCC Pet. 41a), although it too blandly passes over the scope and the difficulty of devising a workable regime. Among other

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distinction is necessary where First Amendment interests are at stake (FCC Pet. 36a); but those interests weigh at least as heavily in *favor* of the station's policy because that policy operates to secure a more thorough and balanced presentation of the issues. See pp. 10, 16, *infra*.

intractable problems involved would be those of defining the types, length and number of editorial advertisements that would have to be carried; establishing priorities among editorial advertisers for the limited time available; delineating the measure of broadcaster control retained over the format and content of the advertisements; and determining the broadcaster's financial responsibility for providing time to reply.

This range of regulation even if feasible would involve the Commission to an unprecedented degree in broadcaster programming decisions. In addition to formulating initial "guidelines," the Commission would be forced to play a continuing role as referee in disagreements between the stations and editorial advertisers over particular advertisements, their formats and their contents. This pervading intervention is precisely what Congress—aware that "the line between regulation and censorship is a thin one" (H. Rep. No. 91-257, 91st Cong., 1st Sess. 3 (1969))—has long sought to avoid, and it would present serious dangers of its own to vigorous and independent broadcasting.

II. THE DECISION BELOW IS IN DIRECT CONFLICT WITH DECISIONS OF THE COURTS OF APPEALS FOR THE FIRST AND THIRD CIRCUITS.

The court below recognized that the First Amendment applies to governmental and not to private action but it determined that for present purposes the action of WTOP was "state action." This determination, an explicit and necessary link in the lower court's analysis (FCC Pet. 10a-19a), ignores the deliberate Congressional decision in the Act to separate broadcasters from the Federal Government, and the determination squarely conflicts with holdings in the First and Third Circuits.

In designing a legislative structure for broadcasting, Congress chose a regime in which the primary responsibility for operational decisions is centered not in the Federal Government, but instead is possessed by private enti-

ties who are, so far as possible, free of direct interference by the Commission. For most purposes, the Act maintains a discernible distance between the broadcaster and the state: within the broad confines of the public interest standard, programming decisions are entrusted to the licensee (see pp. 15-17, *infra*) and the close supervision often imposed on the operations of public utilities and common carriers is not applied to broadcasting under the Act.[13]

Given the public interest in preserving a range of voices and views in broadcasting, the Congressional choice reflects the very interests embedded in the First Amendment. In any case, as Judge McGowan declared in his dissent below, "This is the system which Congress has, wisely or not, provided as the alternative to public ownership and operation" of broadcasting facilities (FCC Pet. 46a). On its face, this is not a regime in which the actions of licensees are coincident with "state action."

The Courts of Appeals for the First and Third Circuits have each expressly held—in rejecting claims of private individuals to "seize the mike"—that a broadcaster in declining such requests is not engaged in "state action" within the meaning of the First Amendment. In *McIntire v. Wm. Penn Broadcasting Co.*, 151 F.2d 597, 601 (3rd Cir. 1945), *cert. denied*, 327 U.S. 779 (1946), the court expressly rejected a contention that the licensee should be deemed "an instrumentality of the federal government" for constitutional purposes, noting that this was not the relationship created by Congress. In *Massachusetts Universalist Convention v. Hildreth & Rogers Co.*, 183 F.2d 497 (1st Cir. 1950), the First Circuit adopted the same view.

[13] *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940). As another court long ago stated, a broadcast licensee does not have the privileges of a regulated utility (*e.g.*, monopoly of service in its area so far as it can provide such service) and, equally, is not subject to the regulation of its rates or its profits as are public utilities. Nor does a broadcaster accept all comers as does a utility or common carrier but instead, subject to the general public interest standard, "the licensee of a radio station chooses its own advertisers and its own program . . . ." *Pulitzer Pub. Co. v. FCC*, 94 F.2d 249, 251 (D.C. Cir. 1937).

The lower court did not question the existence of a direct conflict between the two decisions just cited and its own "state action" holding. In fact, the opinion below cited both cases, rejecting their conclusions as representing a "crabbed judicial view" and "doctrinal impedimenta" (FCC Pet. 11a). A more explicit conflict would be very difficult to conceive, and this outright disagreement between the circuits on a significant issue is an independent basis for the granting of certiorari by this Court. Sup. Ct. R. 19(1)(b).

Certiorari is made more appropriate because, in rejecting the position of the First and Third Circuits and determining that WTOP's programming decisions constitute "state action," the lower court relied principally upon the *Red Lion* decision (FCC Pet. 11a-13a). *Red Lion*, however, involved the lawfulness of particular administrative controls on broadcasters claimed to be authorized under the regulatory statute, and the Court had no occasion to consider and did not pass upon any "state action" question. Without here attempting a full canvass of the decisions of this Court which are in fact pertinent to that question, it is safe to say that none cited by the lower court controls the question whether broadcaster programming decisions constitute such "state action."[14]

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[14]The leading decisions of this Court extending the "state action" concept to protect First Amendment rights from infringement by nominally private persons and entities have involved locations or functions that are usually and intrinsically identified with the state. *E.g.*, *Marsh v. Alabama*, 326 U.S. 501 (1946) (company town); *Amalgamated Food Employees Union v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968) (thoroughfare). Broadcasting in this country is patently not a governmental preserve or function, nor is the lower court persuasive in seeking to apply the "state action" label to broadcasting by extracting general language from cases decided in the quite different context of racial discrimination. It should be repeated, however, that WTOP does not believe its policy on editorial "spot" advertisements violates the First Amendment however the "state action" question may be resolved. See pp. 7-11, *supra*.

The uniqueness of the lower court's "state action" holding is highlighted by considering the precise ruling of the Commission in this case. There was no statutory provision constraining WTOP to follow its policy against the sale of "spot" time for editorial advertising and the Commission's decision neither required nor affirmatively approved that policy. Compare *Public Utilities Commission v. Pollak*, 343 U.S. 451, 462 (1952). Any broadcaster is free under the Act and opinion of the Commission here to sell "spot" advertising time if it believes this course is wise and, indeed, some broadcasters do sell such time. See p. 4, *supra*. In short, WTOP's programming decision was taken on its own initiative and based on its own judgment of the competing factors; the Federal Government has remained entirely neutral; and in every realistic sense the action taken constitutes private rather than state action.

The arms-length relationship that Congress long ago established between broadcasting and the Federal Government has, as the dissenting judge below observed, "never been thought to be other than within the permissible limits of constitutional choice" (FCC Pet. 46a). As the First and Third Circuits recognized, that relationship is not compatible with a finding that private-licensee decisions constitute "state action." Before a drastic revision is made in this pattern created by statute and acknowledged in judicial decision, plenary review by this Court is fully warranted.

III. THE ISSUES PRESENTED ARE OF CENTRAL IMPORTANCE TO THE ADMINISTRATION OF THE COMMUNICATIONS ACT.

As the Act has been administered for over forty years, it has been a cardinal principle of broadcasting operations that the licensee has the ultimate responsibility for selecting the program material carried on its frequency.[15] The decision below explicitly impairs that principle and the significant consequences which follow for the broadcast industry, for the public and for the Commission's administration of the Act furnish a final reason why certiorari should be granted.

It is not disputable that, at least with respect to editorial advertising, the decision below drastically revises both the Commission's longstanding policy of reliance upon the "good faith exercise of . . . [the licensee's] best judgment" in selecting material, formats and spokesmen and the Commission's position that "no single group or person is entitled as a matter of right" to preempt time to express his personal views on public issues. *Fairness Primer*, 40 F.C.C. 598, 609 (1964). The majority's opinion directly curtails the right of broadcasters to reject editorial advertising as

[15] See, *e.g.*, *Pulitzer Pub. Co. v. FCC*, 94 F.2d 249 (D.C. Cir. 1937), quoted p. 12, n. 13, *supra*. This precept has been repeatedly emphasized by the Commission in its general statements (*e.g.*, *Fairness Primer*, 40 F.C.C. 598, 608-09 (1964)) and in its individual rulings. *E.g.*, *Mrs. Madalyn Murray*, 40 F.C.C. 647 (1964). In narrowly defined instances, Congress (in Section 315(a), 47 U.S.C. § 315(a)), and the Commission (in the "personal attack" and "candidate endorsement" regulations upheld in *Red Lion*) have mandated a qualified right of reply by political candidates, their supporters, and individuals subject to personal attacks; in each instance, however, the licensee took responsibility by countenancing the broadcast which gave rise to the reply. Section 315(a), while requiring equal time for opponents of a qualified candidate to reply to him, expressly states that "no obligation is imposed upon any licensee to allow the use of its station by any such candidate."

such. Accordingly, it states that the licensee may not exercise "the same 'authoritative selection' in editorial advertising which he exercises in normal programming" (FCC Pet. 41a).

The decision consequently relates to a matter of continuing importance to broadcasters across the country since program decisions must be made by all of them virtually on a daily basis. Certainly once the door is forcibly opened to the countless private factions, lobbies and pressure groups, it is only realistic to expect that the demands for editorial advertising time will be numerous and widespread.[16] While the opinion below leaves open numerous questions, including its possible extension beyond "spot" advertising to longer programs, these questions merely serve to extend and dramatize its prospective impact on broadcasting.

Any inroads on the broadcaster's ultimate responsibility to determine his programming affects not only the particular material he must broadcast, contrary to his best judgment, but in addition much other programming he may carry. Any substantial change in one area of programming–for example, a concentrated series of "spot" announcements advocating a position on the Vietnam war–may require the broadcaster who seeks to maintain a balanced presentation to make still other changes. This could easily entail substituting a program taking a contrary view on war policy for one previously planned on a quite different but equally important subject, even though diverse views on the war have been repeatedly portrayed and the other subject well might badly warrant exposure.

The ramifications of the decision below affect not only what the licensee broadcasts but also its responsibilities with

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[16]See, *e.g.*, letter to The Committee of One Million, FCC 71-1096, Oct. 22, 1971, concerning a demand to purchase time for "a one hour documentary film entitled, 'U. S. China Policy: Danger at the Crossroads' "; letter to Communication Workers of America, FCC 71-832, Aug. 6, 1971, concerning a demand to purchase time for messages to the union members on "contract ratification."

respect to its broadcasts. At present, because a broadcaster can control the content of its programs, its overall performance can properly be judged in light of the public interest standard when it seeks renewal of its license. For the same reason, a station can be required under the fairness doctrine to supply time for and, if necessary, to subsidize programs needed for balanced presentations on public issues, and it can be held liable in suits by injured parties for defamatory statements it may allow to be transmitted.[17] Serious problems are thus presented whether the licensee continues to be responsible with curtailed power to fulfill his responsibilities, or whether the responsibility itself is proportionately limited.

An apt illustration is provided by the lower court's assumption that to redress any one-sided presentation sanctioned by its decision, the Commission could simply apply the principle of *Cullman Broadcasting Co.*, 40 F.C.C. 576, (1963), to require "advertisements on the other side of the issue, free of charge if necessary" (FCC Pet. 41a). *Cullman*, however, rests on the premise that "where the licensee has *chosen* to broadcast a sponsored program" presenting one side of an issue, it is then its responsibility to present the other side even if it must bear the cost itself. 40 F.C.C. at 577 (emphasis added). It is far from clear that *Cullman* could or should be followed where the licensee has not chosen to present the original broadcast but has, on the contrary, been compelled to do so. See *Farmers Union v. WDAY*, 360 U.S. 525 (1959).

Even if *Cullman* could properly be extended to broadcasts imposed on the licensee under the lower court's decision, the extent of the financial burden upon the broad-

[17]The link between the broadcaster's control of program content and his liability for it was emphasized by this Court in *Farmers Union v. WDAY*, 360 U.S. 525 (1959). That case held that a broadcaster, although normally responsible for defamatory statements transmitted from its station, could not be sued for such an utterance made by one exercising his statutory right to equal time for political candidates under Section 315(a), 47 U.S.C. §315(a).

caster could well be unsupportable.[18] Moreover, the resulting profusion of editorial advertisements would at best be a very questionable contribution to the best uses of scarce spectrum space. Consequently, extension of *Cullman* is neither a sure nor an adequate remedy to redress the imbalance in treatment of public issues, and the increased influence of wealth in forming public opinion, that the lower court's decision seems certain to produce.

The problems illustrated by *Cullman* extend to other areas of broadcaster responsibility, such as license renewal proceedings and suits for defamation. The interests involved are not simply the private interests of broadcasters but relate directly to the programming available to the public and, indeed, to the political process itself. It is thus in the interest of the public as well as the industry that the decision below be subject to review at the earliest possible opportunity.

Immediate review is especially appropriate because of the impact the decision will have on the regulatory process. If the decision is not now reviewed, the Commission and the industry will become increasingly embroiled in the intractable administrative problems which are a necessary consequence of the lower court's decision (see p. 11, *supra*). Before the time and effort of the agency and licensees are diverted away from improved broadcasting and into an imbroglio that may take years to resolve, plenary review in this Court is surely appropriate.

In point of fact, the Commission has recently undertaken to appraise afresh the operation of the fairness doctrine and to consider new proposals to improve its operation. *Study of Fairness Doctrine*, 30 F.C.C.2d 26 (1971). At the same time, the Commission has recognized that any conclusions it may reach or improvements it may attempt depend sig-

[18] According to the latest FCC report, 32 percent of the AM stations and 69 percent of the independent FM stations in this country suffered net losses in 1969. *AM, FM Broadcast Financial Data–1969*, released December 14, 1970.

nificantly on the outcome of cases such as this one. 30 F.C.C.2d at 27, 33. Plainly, this important inquiry cannot be successfully concluded until there is a definitive determination in this Court of the central legal issues presented by the lower court's opinion.

In sum, even if the issues in this case did not rise to a constitutional level or involve a direct conflict among circuits, it would be appropriate for plenary review because of the broad potential impact upon broadcasting and the regulatory process. As this Court said in *Farmers Union v. WDAY*, 360 U.S. 525, 527 (1959), certiorari is warranted "because the questions decided are important to the administration of the Federal Communications Act."

CONCLUSION

For the reasons stated above, the petition for a writ certiorari should be granted.

Respectfully submitted,

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